Ninth Circuit Invalidates 25-to-Life Sentences for Petty Theft

Three months after its decision in *Andrade v. Attorney General of California* (2001) 270 F.3d 743, which struck down a 50-years-to-life sentence for two incidents of shoplifting, the U.S. Court of Appeals, Ninth Circuit, ruled that a 25-years-to-life sentence for petty theft violates the Eighth Amendment prohibition against cruel and unusual punishment. (*Brown v. Mayle* (2002) ___ F.3d ___ [2002 D.A.R. 1638].)

Brown is based nearly entirely on the reasoning of *Andrade*. In *Andrade* the defendant received two 25-to-life sentences for stealing a total of $154 in videotapes in two separate incidents. Andrade's criminal record consisted of two petty thefts, two convictions for transportation of marijuana, a parole violation for escape, and three 1983 residential burglaries. *Brown*, which is a consolidated appeal of two defendants, found Andrade's criminal record similar to its appellants'.

In *Brown*, defendant Bray stole three videotapes from a store in a shopping mall. Defendant's record begins with resisting arrest and trespassing in 1979. He then was convicted in 1980 of three separate counts of robbery, two arising from a single incident wherein a co-defendant threatened the victim with a gun and fired the gun three times as they fled the scene. During the other robbery, defendant's co-participants hit and kicked the victim in the face as they took his watch and $5 in cash. Defendant possessed a dangerous weapon in 1985. He suffered another robbery conviction in 1987. He was found under the influence of a controlled substance in 1991; in 1995, while out on bail for the instant offense, he was convicted of petty theft with a prior.

Defendant Brown shoplifted a $25 steering wheel alarm from a Walgreen's store. His record is longer than Bray's: 1971, two counts of second-degree burglary; 1976, two counts of assault with a deadly weapon; 1984, robbery; 1986, under the influence of a controlled substance; 1987, convictions for giving false information to a police officer, DUI, and driving on a suspended license; 1989, misdemeanor theft; 1990, felony vehicle theft; 1990, misdemeanor convictions for giving false information to the police, burglary, and distributing hypodermic needles; 1991, misdemeanor convictions for theft and battery; 1994, misdemeanor conviction for possession of a controlled substance.

Like *Andrade*, *Brown* found the 25-to-life sentences grossly disproportionate to the crimes. Although *Andrade* was a 50-to-life sentence for two incidents of shoplifting, *Brown* found a 25-to-life sentence for one incident of shoplifting equally disproportionate.

Brown also found the 25-to-life sentences disproportionate in light of sentences imposed for violent offenses such as second-degree murder, voluntary manslaughter, rape, and sexual assault on a minor. The court observed that a person with a violent, non-theft-related record who commits a petty theft would receive a maximum sentence of only six months; Andrade, Bray, and Brown therefore received greater punishments than do persons who commit serious violent crimes. As in *Andrade*, the court in *Brown* concluded that the sentences imposed on the defendants were disproportionate to the punishments they might have received in other states.

The final point of comparison between *Andrade* and *Brown* was the extent of violence in the defendants' criminal histories. Although Andrade's three residential burglaries did not involve actual violence, *Brown* observed that such crimes carry a strong potential for violence. *Brown* also noted that robbery was not a "violent felony" under Penal Code section 667.5(c)(9) at the time of the convictions.

More importantly, however, *Brown* held that "the presence of violent prior offenses might well be of great significance were the crime of conviction a violent crime, but cannot be where the crime of conviction is nonviolent. Where the crime of conviction is a violent one, a more severe recidivist sentencing scheme for defendants with past convictions for violent crimes would simply reflect a judgment that such individuals cannot curb their violence and should therefore be imprisoned for at least a lengthy time and for as long as life. But where, as here, the present conviction does *not* demonstrate continued proclivity toward involvement in violent crime, distinguishing between criminals convicted for nonviolent offenses on the basis of their *past* violence would run up against compelling Double Jeopardy Clause considerations" (emphasis in original). (*Ibid.*)

Brown noted that courts have consistently upheld stricter punishment for recidivists against double jeopardy challenges. At the same time, the Constitution prohibits double punishment for the same criminal act. Accordingly, prior convictions can be relevant only if they aggravate defendant's conduct in the current crime. The court found two possible theoretical circumstances in which past criminal conduct might be properly connected to a current crime: first, when "the defendant's repeated violations of the criminal law reveal his incapability of conforming to society's norms in general," and second, when "the defendant's current offense involves repetition of a *particular offense characteristic*, indicating that the defendant remains prone to that specific kind of antisocial activity" (emphasis in original). (*Ibid.*)

Brown found that *Andrade* disposed of the first theory: no general tendency to break the law will justify a life sentence for petty theft. The court also could not distinguish *Andrade* on the basis that its defendants had been violent in the past. To do so, concluded *Brown*, would be to impose additional punishment for the earlier crimes and thus violate the double jeopardy clause. Although the court did not hold the three-strikes law unconstitutional, it held that it is not constitutional to the extent that it mandates a sentence of 25 years to life for petty theft.

It is anticipated that *Brown* will have an immediate impact on the 340 persons currently serving third-strike terms for petty theft in California. The real question, however, is how far the opinion will be extended to other inmates whose current convictions are not based on violent crimes. As of January 31, 2001, more than 6,600 persons have been committed to the Department of Corrections as third-strike offenders. Only 40 percent of the third-strike offenders are there because of crimes against persons; the other 60 percent were committed on property and drug offenses.

Erwin Chemerinsky, a law professor at the University of Southern California who represented the appellants in both *Andrade* and *Brown*, predicted that similar constitutional challenges will be raised for other defendants serving third-strike terms for nonviolent offenses. Indeed, it is hard to imagine that several thousand inmates are not intently drafting pro se petitions for habeas corpus relief in the federal courts even as these words are being written. ■

Judge J. Richard Couzens, Superior Court of Placer County

Judge Couzens is a former member of the Judicial Council and past chair of its Criminal Law Advisory Committee.

CRIME and PUNISHMENT

Supreme Court Improves Procedures in Death Penalty Cases

The California Supreme Court has taken action on two proposals designed to enhance the court's procedures in death penalty appeals and habeas corpus proceedings.

At an administrative conference in January, the court adopted a new procedure for the reimbursement of habeas corpus investigative expenses and approved distribution for comment of a proposal to change fixed fee payment procedures.

The proposals follow a series of consultations with the Habeas Corpus Resource Center, the Office of the State Public Defender, and the California Appellate Project. For the past two years, court staff members and the leaders of these three defense entities have met regularly to discuss changes that will assist the court in recruiting and appointing additional qualified counsel to represent defendants on death row. The court also received input from focus groups throughout the state that explored issues with possible impact on counsel's willingness and ability to seek appointment in these cases.

HABEAS CORPUS EXPENSES

Attorneys expressed concern that photocopying trial counsel's files often requires them to use a disproportionately large part of the money allowed for habeas corpus investigation expenses (a maximum of $25,000 unless and until an order to show cause is issued).

After consultation with the State Public Defender and the director of the California Appellate Project, the Supreme Court discovered that these photocopying costs were typically $1,000 to $2,000 per case. The court concluded that separate and additional payment of this expense is appropriate and may be requested by attorneys in all matters in which the habeas corpus petition has not yet been filed.

FIXED-FEE PAYMENT OPTION

The present fixed-fee payment option for death penalty counsel provides for five or six payments (depending on the scope of the appointment) to be made at fixed stages in the course of the proceedings. These cases often take considerable time, and several attorneys had difficulty managing their cash flows because the setting of the fixed stages was not always within their control.

The proposed revision to the payment schedule retains the current payment structure but permits the court to advance attorneys portions of their payments after they complete specified tasks. The court foresees that this option will allow counsel to obtain partial payment at more frequent intervals and at the same time will assist the court in ensuring that counsel are progressing steadily in their cases. The court approved circulation of this draft proposal to appointed counsel and to other interested persons and is currently reviewing the responses.

The National Technology Agenda


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Watch on Washington

The federal technology agenda for 2002 for state courts is being shaped by two phenomena: the debate over the terrorist attacks on September 11 and the activities of the U.S. Department of Justice's Global Justice Information Network Advisory Committee. The report on the Global advisory committee is especially encouraging as courts have played a large and effective role in setting its agenda. The implications for courts resulting from the debate over the terrorist attacks are more difficult to assess as issues are still taking shape.

THE EFFECTS OF SEPTEMBER 11

The terrorist attacks of September 11 and the anthrax attacks that followed soon afterward focused policy discussions in Washington on security and law enforcement. Congress adopted two bills in October and November to address these issues—the USA Patriot Act (Pub. L. 107-56) and the Aviation and Transportation Security Act (Pub. L. 107-71). Neither bill has immediate implications for state courts. But some of the details may lead to further legislative initiatives, and implementation of the aviation security bill could add to state court workloads.

Both bills focus on federal antiterrorist efforts. The USA Patriot Act made it easier for law enforcement and intelligence agencies to exchange information, revised the authority and procedures of immigration, and targeted prosecution of suspected terrorists, especially noncitizen residents. The Aviation and Transportation Security Act resulted from the U.S. Department of Transportation being charged with establishing a federal passenger inspection system and its need to recruit more than 15,000 new employees for airport security. None of these provisions has an immediate effect on state courts. However, the new rules and procedures governing federal law enforcement efforts could affect state courts if they become a model followed by state legislatures. The new federal employees may impact the courts as they will be subject to criminal background checks that are sure to require searches of court records.

A less tangible, but no less important, effect of the September events has been to make security the overriding concern of the U.S. Department of Justice (DOJ), which threatens any program that cannot be directly tied to the antiterrorism effort. Security has become the rationale for a host of DOJ programs, including information sharing. To add to this pressure, the U.S. Attorney General has announced that the department is on a "war footing" and is searching for funds to support the expanded antiterrorism effort. Grant programs, especially state grant programs, are an obvious target.

The attention now being given to issues of identification of individuals may have an impact on the courts. Both the patriot act and the aviation security act call for greater attention to the use of bio-identifiers to confirm the identity of individuals. Neither act specifies the identifiers to be used, but subsequent discussions have turned to retina scans, facial recognition systems, and iris scans, not to mention the more prosaic fingerprints. The acts also call for greater integration of the identity verification systems at airports and customs checkpoints with criminal histories. The DOJ and the U.S. Customs Service have received funds to explore identity systems and technology that facilitates information exchanges.

The concern with identifying terrorists has led some lawmakers to ponder aloud the possibility of some form of national identity card. Early musings by a few legislators evoked a heated response that muted all further public discussion. But the debate is not over, and Congress is likely to return to the subject this year. Less ambitious, but more probable, is an effort by the American Association of Motor Vehicle Administrators (AAMVA) to develop uniform standards for state driver's licenses. The association's interest predated the September 11 events as it formed a task force last summer to develop standards for the format and content of state driver's licenses. The need for bio-identifiers to supplement the photograph—such as fingerprints, which are used in most states—has been a topic of discussion. AAMVA is trying to enhance the driver's license as a reliable source for verifying identification without raising the specter of a national identification card. The task force's final report is due this summer.

With the possible exception of criminal background checks for the new airport security employees, none of these issues is likely to have an immediate impact on state courts. Collectively, however, they are signals of changes in the environment that are sure to impact information technology and data sharing.

GLOBAL JUSTICE INFORMATION NETWORK ADVISORY COMMITTEE

The Global advisory committee has become the vehicle for guiding and promoting the four-year-old integrated information system initiative of the Office of Justice Programs (OJP) and its Bureau of Justice Assistance (BJA), both part of the U.S. Department of Justice. Committee membership consists of delegates from more than 30 groups and federal agencies, representing primarily criminal justice—law enforcement, courts, prosecutors, defense, corrections—but also includes groups such as AAMVA, governors, and legislators.

The importance of the Global advisory committee lies as much in the dialogue among the members as in the projects and activities it has carried out. Its existence has provided a venue for strangers from the various disciplines, branches of government, and levels of government to come together and establish a trust and understanding that have led to strategies for developing systems that can share information. That trust and the willingness of BJA and National Institute of Justice (NIJ) officials to invest scarce resources in proposed strategies have led to important accomplishments in the development of standards for software development and privacy guidelines and have laid the foundation for a collaborative approach to issues of security and data quality.

Four workgroups are carrying out the work of the Global advisory committee: Infrastructure/Standards, Privacy/Data Quality, Security, and Outreach. A summary of the Global committee's activities can be found at http://it.ojp.gov/global.

INFRASTRUCTURE/ STANDARDS

This workgroup is creating a process to encourage the development of standards for software and hardware that will support sharing information among agencies, disciplines, levels of government, and branches of government. What has emerged is a national registry system for standards that address operational issues within the members' own agencies. This registry is expected to be operational this spring.

The model for this effort has been the Court Functional Standards Initiative of the Conference of State Court Administrators (COSCA) and the National Association for Court Management (NACM). The BJA has awarded grants to a consortium of law enforcement groups headed by the International Association of Chiefs of Police, the American Probation and Parole Association, and the Association of Corrections Information Officers to develop similar standards in their respective disciplines.

The workgroup has helped to sponsor meetings among courts, law enforcement organizations, and motor vehicle licensing agencies to collaborate on XML standards. XML (extensible markup language) is a relatively simple technology that allows information to move between incompatible systems. Each discipline has one or more projects under way that use XML to support information exchanges—court electronic filing, interstate driving records, criminal history records, and law enforcement intelligence information. There has been a successful effort to develop definitions of many of the data elements common to two or more of the disciplines.

PRIVACY/DATA QUALITY

The BJA has funded the development of three papers on the issues of privacy and information quality. They are designed to provide a checklist of issues to be addressed for anyone developing an information system. These papers are available on the Web at http://it.ojp.gov/initiatives/public_access.html. This year the workgroup will turn to issues of data quality. Included in its agenda will be the long-standing problem of courts reporting dispositions to criminal history repositories.

FUNDING

The BJA is providing grants to several organizations such as the National Center for State Courts (NCSC), the Institute for Intergovernmental Research, the National Criminal Justice Association, and SEARCH so they can help support the workgroups' efforts. Staff from the U.S. Department of Commerce Technology Administration, acting under contract to the National Institute of Justice's Technology Standards Program, are helping to develop the standards registry. They have provided invaluable technical expertise to a committee largely made up of policy people.

The major weakness of the efforts of both the Global advisory committee and the BJA integrated justice information initiative is that there is no explicit legislative mandate for their work. To date, work has been funded from BJA and NIJ discretionary funds. Those unencumbered funds were heavily earmarked by Congress for fiscal year 2002 and are vulnerable to attachment by the U.S. Attorney General as he searches for money to support his expanded antiterrorism campaign. ■